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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 28

HERTHA J. SIBBACH,

Petitioner,

vs.

WILSON & COMPANY, INC.,

Respondent.

BRIEF FOR THE RESPONDENT IN REPLY TO THE SEVERAL BRIEFS FILED BY PETITIONER.

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There is embodied in this one brief the respondent's reply to the petitioner's brief and reply brief in support of the petition for certiorari and the recently filed supplemental brief.

1. The opinion of the Circuit Court of Appeals is reported in 108 Fed. (2d) 415, and also is to be found in the Record, pp. 14-17.

2. The jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended, by the Act of February 13, 1935, 43 Stat. 936, 938. (28 U. S. C. 347a.)

3. Statement of the case and question presented.

The automobile accident which caused the injuries sued for in this case occurred in Indiana (R. 1), and the laws of that State determine the substantive rights involved in the plaintiff's claim for relief.

The Federal District Court sitting in Chicago, Illinois, was the forum in which the plaintiff, a non-resident of Illinois, brought this action to try out her claim (R. 1); and that court, in accordance with the Rules of Civil Procedure for the District Courts of the United States, entered the order here attacked for a physical examination of the petitioner.

Neither the form of the order itself, nor the penalty of arrest and imprisonment for contempt because of failure to obey it, has ever been questioned in this case, and no such question is raised on the record before this court.

The sole attack made by the petitioner is that the order requiring a physical examination of the petitioner is invalid because Rule 35 upon which it stands is invalid as being in conflict with the provisions of the Rules Enabling Act.

(For purposes of ready reference, the Rules Enabling Act is set forth in the appendix to this brief. There are also set forth in the same place the Rules of Decision Statute and the Conformity Act.)

SUMMARY OF THE ARGUMENT.

If the matter involved in the order for a physical examination of the petitioner is one of substantive law, then the substantive rights upon which the claim for relief is based are controlled and defined by the law of Indiana, the site of the occurrence. The law of Indiana authorizes an order requiring a physical examination.

If the matter involved in the order is one of procedural law, it is governed by the Federal law, and the Federal Rules of Civil Procedure apply.

Federal Rule of Civil Procedure No. 35 which authorized the order for a physical examination is a valid exercise by the Supreme Court of the power delegated to it by Congress in the Rules Enabling Act.

The power thus delegated is sufficiently broad to cover the entire field of practice and procedure.

The challenged rule deals with a matter of procedure, does not deal with substantive law and does not abridge or modify substantive rights established by substantive law.

The matter dealt with does not relate to the right of action involved in this procedure, but does relate to the method of determining the truth of the facts upon which the claim for relief is based.

The decisions of this court do not hold that the matter involved in the rule is one of substantive law, but on the contrary hold that it is a matter of procedural law.

The petitioner's contention that the limitation in the statute against abridging or modifying substantive rights applies to some matters of procedure which are important is not tenable.

Nor is petitioner's contention tenable that to construe the

limitation to apply to substantive rights created by substantive law would render the language surplusage. That limitation coupled with the provision against rules effecting the right of trial by jury guaranteed by the Constitution was a cautionary statement which Congress had the right to make, and particularly so in view of the fact that at that time the rule of law was still in force as announced in *Swift* v. *Tyson*, 16 Pet. 1, that matters of general law were to be determined by Federal and not by State decisions. That rule was not overruled by this court until four years after the Enabling Act was passed. (*Erie* v. *Tompkins*, 304 U. S. 64 (1938).)

The Illinois decisions holding that the Illinois courts have no power, in the absence of a statute, to order a physical examination can be of no effect whatsoever in Federal courts sitting in Illinois.

The Rules of Decision statute applies only to matters of substantive law and does not apply to matters of procedure.

It is not denied by the petitioner that Congress would have the power to enact a law providing for a physical examination. The contention of the petitioner is that the Rules Enabling Act not only does not provide for any such power but that therein Congress specifically forbade the making of rules of procedure involving important matters, such as a physical examination as specified in Rule 35; and that, therefore, in the absence of any act of Congress authorizing an order directing a physical examination, the rule is invalid.

But conceding for the purpose of the argument counsel's position that the limitation forbids abridging substantial and important rights of *procedure*, the foundation upon which the position rests fails because of the fact that all of the rules were duly reported to Congress at the beginning of a regular session and took effect at its close in accordance with the terms of the Rules Enabling Act. Thereby

the rules, including this rule 35, came to have the full force and effect of an act of Congress.

The adoption of the construction of the Enabling Act, as urged by the petitioner, would lead to such confusion in matters of practice and procedure in the Federal courts, that Congress must be presumed to have intended no such meaning.

The adoption of such construction would nullify many of the eighty-seven rules promulgated by the court in accordance with the Rules Enabling Act.

ARGUMENT.

FIRST: If the Matter Involved in the Order Attacked Be Regarded as a Matter of Substantive Law, Then the Order Is Valid, as It Is Controlled by the Law of the State Where the Cause of Action Arose—Indiana, and the Law of That State Authorizes the Courts to Make Such Orders.

That matters of substantive law are controlled by the law of the State where the cause of action arose was settled by this court in *Erie* v. *Tompkins*, 304 U. S. 67.

Under the law of Indiana where this cause of action arose, the courts have the power to enter an order directing a physical examination.

City of South Bend v. *Turner*, 60 N. E. 271, 156 Ind. 418.

Aspy v. *Botkins*, 66 N. E. 462, 160 Ind. 170 (1903).

Kokomo M. & W. etc. Co. v. *Walsh*, 108 N. E. 19, 22 (1915), 58 Ind. App. 182.

Lake Erie & W. R. Co. v. *Griswold*, 125 N. E. 783, 784 (1920), 72 Ind. App. 265.

City of Valparaiso v. *Kinney*, 131 N. E. 237, 238 (1921), 75 Ind. App. 660.

SECOND: If the Matter Involved in the Order Is One of Procedure, Then It Is Controlled by Federal Law, the Federal Rules of Civil Procedure.

Rule 35, the Rule in Question, Is Valid.

I.

Congress Has the Power and Duty to Prescribe the Procedure in the Federal Courts and That Power Can Be Validly Delegated to the Courts.

We do not understand counsel for the petitioner to question the power of Congress to prescribe rules of procedure. We do understand that they raise some question whether that power can be delegated by Congress to the courts. And in view of that question some discussion of this phase of the problem becomes necessary. Long ago this court settled the question when it held that Congress could validly delegate to the courts the power to make rules covering practice and procedure.

In the case of *Wayman* v. *Southard*, 10 Wheat. 1, the contention before the court was that a Kentucky statute in relation to exceptions should apply to procedure in the Federal courts. This court, speaking through Chief Justice Marshall, held that the Kentucky statute could have no application whatsoever for the reason that the power to control procedure of Federal courts lay in Congress and that it could delegate that power to this court, and in discussing the latter proposition, said at page 18:

> "But the objection which gentlemen make to this delegation of legislative power seems to the court to be fatal to their argument. If Congress cannot invest the courts with the power of altering the modes of proceeding of their own officers, in the service of executions issued on their own judgments, how will gentlemen defend a delegation of the same power to the state legislatures? The state assemblies do not constitute a legislative body for the union. They possess no portion of that legislative power which the constitution vests in congress, and cannot receive it by delegation. How, then, will gentlemen defend their construction of the thirty-fourth section of the judiciary act? From this section they derive the whole obligation which they ascribe to subsequent acts of the state legislatures over

the modes of proceeding in the courts of the union. This section is unquestionably prospective as well as retrospective. It regards future as well as existing laws. If, then, it embraces the rules of practice, the modes of proceeding in suits; if it adopts future state laws to regulate the conduct of the officer in the performance of his official duties, it delegates to the state legislatures the power which the constitution has conferred on Congress, and which, gentlemen say, is incapable of delegation."

Mr. Justice Story passed on a similar question in *Beers* v. *Haughton*, 9 Peters 328, 34 U. S. 329, and said at page 359:

"State laws cannot control the exercise of the powers of the national government, or in any manner limit or affect the operation of the process or proceedings in the National Courts. The whole efficacy of such laws in the Courts of the United States depends upon the enactments of Congress. So far as they are adopted by Congress they are obligatory. Beyond this, they have no controlling influence. Congress may adopt such state laws directly by a substantive enactment, or they may confide the authority to adopt them to the courts of the United States."

* * * * * * *

"The constitutional validity and extent of the power thus given to the Courts of the United States, to make alterations and additions in the process, as well as in the modes of proceeding in suits, was fully considered by this Court in the cases of *Wayman* v. *Southard*, 10 Wheat. Rep. 1, and the *Bank of the United States* v. *Halstead*, 10 Wheat. Rep. 51. It was there held, that this delegation of power by Congress was perfectly constitutional; that the power to alter and add to the process and modes of proceeding in a suit embraced the whole progress of such suit, and every transaction in it from its commencement to its termination, and until the judgment should be satisfied; and that it authorized the Courts to prescribe and regulate the conduct of the officer in the execution of final process, in giving effect to its judgment. And it was emphatically laid down, that 'a general superintendence over this subject seems to be properly within the judicial province, and has always been so considered'; and that 'this

provision enables the Courts of the Union to make such improvements in its forms and modes of proceeding as experience may suggest; and especially to adopt such state laws on this subject, as might vary to advantage the forms and modes of proceeding, which prevailed in September, 1789."

See also *Bank of U. S.* v. *Halstead*, 10 Wheaton 22, 27.

II.

The Language of the Enabling Act With Reference to the Subjects to Be Covered by the Rules Broadly Authorizes Rules Covering the Entire Field of Practice and Procedure.

The enabling paragraph of the act gives the Supreme Court the power to prescribe by general rules the "forms of process, writs, pleadings and motions and the practice and procedure" in civil actions at law. The courts from the very beginning of the national government have given the broadest possible meaning to these terms.

The cases above quoted demonstrate the accuracy of that proposition. In the Wayman case (*Wayman* v. *Southard*, 10 Wheat. 1) the court said with reference to the term "forms and modes of proceeding" (p. 7):

> "It has not, we believe, been doubted, that this sentence was intended to regulate the whole course of proceeding, 'in causes of equity, and of admiralty and maritime jurisdiction.'"

In the case of *Kring* v. *Missouri*, 107 U. S. 221 (1882), the question before the court was whether a certain statute of the State of Missouri violated the constitutional provisions against *ex post facto* laws.

If the statute involved a mere matter of procedure, there was no constitutional violation. This court, in discussing that question, says at page 231:

> "The word 'procedure', as a law term, is not well

understood, and is not found at all in Bouvier's Law Dictionary, the best work of the kind in this country. Fortunately a distinguished writer on Criminal Law in America has adopted it as the title to a work of two volumes. Bishop on Criminal Procedure. In his first chapter he undertakes to define what is meant by procedure. He says: 'S.2. The term 'procedure' is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, Pleading, Evidence and Practice.' And in defining Practice, in this sense, he says: 'The word means those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in;' and Evidence, he says, as part of procedure, 'signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted.' "

The English Courts have had to consider most meticulously the difference between substantive law and procedure owing to the fact that cases involving questions of procedure may be considered only by certain courts on appeal. See *Lever Bros. Ltd.* v. *Kneale & Bagnell*, 157 L. T. R. 30, 2 K. B. 87, 92 (1937). The case of *Poyser* v. *Minors*, 56 L. T. R. 33, 7 Q. B. D. 329 (1881) is typical. There a rule of court as to the effect of a non-suit was challenged on the ground that it attempted to declare substantive law, *i. e.*, the legal effect of the judgment of the court. The court, in ruling against this contention, said (333):

> "Practice in the larger sense • • • like procedure • • • denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right and which, by means of the proceeding, the court is to administer, the machinery, as distinguished from its product."

Of course in the construction of any statute the condition which the statute sought to remedy, the general purpose and objective of the statute must be considered. The

Rules Enabling Act was enacted after a long debate conducted by the bench and bar and by Congress with reference to the procedural difficulties that had developed in the Federal courts. We can find no better expression of the existing situation and its importance in the matter we are here discussing than in the language of one of the members of the Advisory Committee, Mr. Edson R. Sunderland in his article in the American Bar Association Journal entitled "Character and Extent of the Rule Making Power Granted United States Supreme Court and Methods of Effective Exercise," Volume XXI, page 404. He says in part as follows:

> "The purpose of the present grant of rule-making power should therefore constitute an important guide for determining what should be deemed procedure and what should be considered matter of substantive right.
>
> It would seem reasonable to assume that the general purpose of the present Act was to confer upon the Supreme Court of the United States broad regulatory powers over federal machinery for the administration of justice, in order to increase its general effectiveness. No special purpose is apparent which would be served by restricting its scope. The right given to the Court to override existing statutes indicates a purpose to confer broad rather than narrow powers. Under this view, all those rights and duties which control the relations of individuals with each other and with the body politic, would remain under legislative control; but the means and the methods by which those rights and duties are to be protected and enforced through the courts, would be under the direction of the Supreme Court. In other words the rights which may normally be enjoyed under the legal system without recourse to a court, or the final equivalents therefor offered by the law in case they are denied, are substantive, but when the parties have been drawn into litigation, every means and facility which the court offers, whether through its ordinary mechanism or through special proceedings or auxiliary remedies, to aid or protect those rights or to provide those equivalents, is procedural."

And:

"If this interpretation of the scope of procedure is approved, the new federal rules may include the right to use, and the manner of using, every proceeding, operation, expedient or device capable of contributing to the progress of the cause, from the beginning to the end of the litigation, including *mesne* and final process and every type of auxiliary remedy, but they should not deal in any way with the character of the rights which are to be determined by the final judgment."

III.

The Challenged Rule Deals With a Matter of Procedure, Does Not Deal With Substantive Rights.

Rule 35 of the Federal Rules of Civil Procedure involves a matter of procedure. It does not involve substantive law, nor abridge nor modify a substantive right established by substantive law. The substantive rights in this case are those rights out of which the right of action arose. This rule does not affect any of the rights that go to make up that right of action, but merely affects the procedure whereby that right of action is sought to be determined; it is a part of the means whereby the court determines the truth of the facts upon which the right of action is based.

In the language of the cases above referred to, the rule provides but a step to be taken in the cause. It is a part of the course of the proceeding. It is the method of proceeding whereby the right of action is enforced as distinguished from the law giving or defining that right. It is part of the court machinery as distinguished from the ultimate result.

It appears necessary to discuss this question as we are not quite clear whether counsel for petitioner do or do not maintain that Rule 35 involves a matter of substantive law as contradistinguished to procedural law. They do

seem to admit that the matter is one of procedure, and yet they discuss at length the Rules of Decision statute and the case of *Erie R. R.* v. *Tompkins,* 304 U. S. 64, and seem at least in part to base their argument on a substantive law consideration, as defined in the decision of this court in that case.

In the *Erie Railroad* case this court settled the rule that matters of substantive law are governed by the law of the State where the court of action arose and that the source of substantive law is not merely, as was held in *Swift* v. *Tyson,* 16 Pet. 1, the statutes of a State, but also the decisions of the State in question; and that any other decision and any other construction of the Rules of Decision Act would be in violation of the Constitution. These matters we mention as a preliminary consideration to a discussion of the case of *Union Pacific* v. *Botsford,* 141 U. S. 250, which is cited in support of the contention that the rule we are considering abridges a substantive right.

We respectfully submit that a brief review of the facts and opinion in the Botsford case will demonstrate that it does not support the contention, and on the contrary clearly shows that the matter involved is one of procedural law and not substantive law.

In that case there was involved no Federal statute authorizing an order for a physical examination; there was no general rule of court to that effect, but simply an order of court without a statute or general rule back of it. The accident out of which the cause of action arose occurred in the then territory of Utah (a fact not stated in the opinion but to be found on page 1 of the printed record). The case was tried in the Federal Court sitting in Indiana. The holding of this court was that the trial court "has no power to subject a party to such an examination as this." (p. 257.) In other words, the sum and substance of the decision is that in the absence of a statute authorizing it,

the order was invalid. That is doubly clear when we come to consider the subsequent case of *Camden & Suburban R. R. Co. v. Stetson*, 177 U. S. 172, where this court held that in view of a statute authorizing an examination, the order was valid.

The holding that the court did not have the "power" to enter such an order does not indicate that the matter involved substantive law or substantive rights. The "power" of the court could, of course, refer to either matters of substantive law or procedural law.

In no part of the decision in the Botsford case did this court hold that the matter involved in an order for a physical examination is one of substantive law or involves a substantive right established by substantive law.

On the contrary the matter is treated throughout the opinion as a matter of procedure. That is demonstrated beyond dispute by the fact that in treating a contention made by the defendant that a certain statute of Indiana permitting the court to order a view of such real or personal property, as was the subject of the litigation, or of the place where any material fact occurred, this court held that the statute could not apply for the reason as follows (p. 256):

> "But this is not a question which is governed by the law or practice of the State in which the trial is had. *It depends upon the power of the national courts under the Constitution and laws of the United States.*" (Italics ours.)

That statement would not have been possible had the court been considering the matter as one of substantive law, as matters of substantive law would be controlled by the law of the State where the cause of action arose and not by the Constitution or laws of the United States. The Rules of Decision Act then in force 100 years so provided and the decisions of this court, particularly the case of *Wayman* v. *Southard*, 10 Wheat 1, 26, settled the proposi-

tion, as said by Chief Justice Marshall that the Rules of Decision statute "had no application to the practice of the court."

And even though at that time under the rule of *Swift* v. *Tyson*, 16 Pet. 1, the substantive law could be determined solely from the statutes of the State and not from its decisions, nevertheless as we have seen above, the court in the *Botsford* case was considering whether or not an Indiana statute was applicable—the one permitting an order for a view of the property or place involved in the litigation. So, therefore, when this court in the *Botsford* case said that the matter was not one to be governed by the statute of Indiana, *in view of the conflicting Federal statute*, but did depend "upon the power of the national courts under the Constitution and laws of the United States", it demonstrated that it was treating the matter as one of practice and procedure and not one of substantive law. This is still further borne out in the opinion by the next succeeding paragraph where the court discusses the Indiana statute and points out that Congress had covered the subject in its statute with reference to proof and that, therefore, the Federal statute controlled. The language of the court in that regard is as follows (page 256):

> "Congress has enacted that 'the mode of proof in the trial of actions at common law shall be by oral testimony and examinations of witnesses in open court, except as hereinafter provided, and has then made special provisions for taking depositions. Rev. Stat. §§ 861, 863 *et seq.* The only power of discovery or inspection conferred by Congress, is to 'require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery,' and to nonsuit or default a party failing to comply with such an order. Rev. Stat. § 724. And the provision of § 914, by which the practice, pleadings and forms and modes of proceeding in the courts of each State are to be

followed in actions at law in the courts of the United States held within the same State, neither restricts nor enlarges the power of these courts to order the examination of parties out of court."

But this could not have been said if the matter involved was one of substantive law.

That this analysis is valid is still further apparent from the fact that the court relies upon the case of *Ex Parte Fisk*, 113 U. S. 713, wherein the question was whether a New York statute requiring an examination by deposition in advance of trial could have effect in the federal courts. This Court held it could not in the face of the Federal statutes controlling the same subject matter. The New York statute was obviously one of procedure and, of course, the decision could have had no part in the opinion of the *Botsford* case unless this Court were regarding the matter involved in the *Botsford* case as one of procedure.

Nor does the succeeding case in this court, *Camden & Suburban R. R. Co.* v. *Stetson*, 177 U. S. 172, hold that the matter involved is one of substantive law. It is true the opinion of the court refers to and is based upon the Rules of Decision Act and that the Rules of Decision Act does, of course, only apply to substantive law. *But in that case the same State, New Jersey, was the scene of the accident, the place where the right of action arose, and the place where the Federal Court sat to try out that right of action. Therefore, there was no question before the court requiring any distinction between substantive law and procedural law.*

The sole question presented was the effect of a statute of New Jersey. That statute did not merely cover the general matter of discovery in conflict with the Federal statutes, as in the Botsford case, but did specifically authorize the courts of New Jersey to enter an order for a physical examination. The statute was in conflict with no Federal statute. The Rules of Decision statute required

in the field covered by it, that the New Jersey statutes be given full force and effect. The Conformity statute also required in the field covered by it, that the New Jersey statute control. So that it was immaterial which Federal statute was applied. The same result would be reached under either.

And even though this court did apply the Rules of Decision statute in the Stetson case, we submit that the decision itself clearly demonstrates that the court did in fact treat and regard the matter as one of procedure, as particularly the following excerpts from the opinion indicate (p. 175):

> "We do not dispute *that if there were no law of the United States which, in connection with the state law, could be referred* to as in effect providing for the exercise of the power, the court could not grant the order under the decision in the case of Botsford. But we say *there is a law of the United States* which does apply the laws of the State where the United States *court sits,* and where the State has a law which provides for the making of an order for the examination of the person of a plaintiff in a case like this, the law of the United States applies that law to cases of such a nature on trial in *Federal courts sitting in that State.* In the *Botsford* case there was no state law, and consequently no foundation for the application of the law of the United States." (Italics ours.)

Obviously if the question involved were one of substantive law, it would have made no difference one way or another whether or not there was a Federal statute, the State law would have been controlling and this utterance would have been entirely foreign to the subject.

It is also to be noted from the above excerpts from the opinion in the Camden case that the court in applying the Federal statute speaks of the State where *"the court sits"* and the application of the law to cases on trial "in Federal Courts *sitting in that State.*" The Rules of Decision statute governing *substantive law* does not mention

the State where the court is sitting. The place where the court is sitting has no bearing upon the question of the law applicable under the Rules of Decision statute. It is the State where the cause of action arose that determines that question. But the Conformity Act (see appendix to this brief) does specify that the *procedural* law to be applied is the law of the State where the court sits, the language being "within which such district courts are held". Hence, it seems true that while the Rules of Decision Act was the one spoken of, the basic legal principle involved and applied was that expressed in the Conformity statute, and that the apparent confusion grew out of the very fact that under the particular facts of that case, either statute might be regarded as applicable and would produce the same result.

In *Chicago & North Western Ry. Co. v. Kendall*, 167 Fed. 62 (1909), there was attacked in a Federal Court sitting in Iowa an order for a physical examination of the plaintiff in a suit on account of an accident and personal injury occurring in Iowa. There were Iowa decisions upholding the power of the Iowa courts to enter such an order, and the question was whether those decisions were binding on the Federal Court under the Rules of Decision Act or under the Conformity statute. The court holding after a very full discussion that the Conformity Act applied says, at page 65:

> "The question is not whether such testimony would be admissible in evidence, but whether the court has, at common law, the power to compel the plaintiff to submit to a surgical examination. *We are therefore presented with a matter of practice rather than a rule of evidence.*"

And again:

> "*Being a matter of practice relating to the power of courts, neither state statutes nor the decisions of state courts on the subject* are binding on federal courts under section 721 of the Revised Statutes.

This was early decided by the Supreme Court in *Wayman* v. *Southard,* 10 Wheat. 1, 6 L. Ed. 253. It was there held that section 34 of the judiciary act, being the same as section 721 of the Revised Statutes—

> 'does not apply to the process and practice of the federal courts; it is a mere legislative recognition of the principles of universal jurisprudence as to the operation of the *lex loci.*'

In a great variety of cases coming before this court over the years, the question was presented whether certain State statutes should be given effect in the Federal courts. And in those cases, this court consistently held that the statutes involved were not applicable and had no effect whatever in the Federal Court, either for the reason that there was no Federal statute making them applicable or for the reason that the Conformity statute could not make them applicable in the face of a Federal statute specifically covering the matters. The significance of the decisions is that if the matters covered by the state statutes were in the class of substantive law, the statutes would have been applicable and controlling under the Constitution and Rules of Decision Act irrespective of the Conformity Act or any other Federal statute.

A running review of these cases shows the very broad field covered by procedure and demonstrates that the matter of physical examination is within that field.

In each of these cases it was held that the statute mentioned was of no effect in the Federal court.

McCracken v. *Hayward,* 2 Howard 608. A statute of Illinois providing that a sale under levy should not be confirmed unless the price be two-thirds of the appraised value of the property.

Bank of the United States v. *Halstead,* 10 Wheat. 51. A Kentucky statute prohibiting the sale of property taken under execution for less than three-fourths of its appraised value.

Wayman v. *Southard*, 10 Wheat. 1. A Kentucky statute requiring the endorsement on an execution that bank notes of the Bank of Kentucky be received in payment.

Shepard v. *Adams*, 168 U. S. 618. A Colorado statute with reference to the issuance of summons.

Southern Pacific Co. v. *Denton*, 146 U. S. 202. A Texas statute concerning service of process and providing for a waiver by the defendant of any defect as a result of pleading over after the lower court had ruled againsnt the defendant.

Mexican Central Railway v. *Pinkney*, 149 U. S. 194. To the same effect.

Potter v. *National Bank*, 102 U. S. 163. A statute of Illinois involving the competency of witnesses and the Federal statute covering the same subject.

King v. *Worthington*, 104 U. S. 44. To the same effect.

Pusey & Jones Co. v. *Hanssen*, 261 U. S. 491. A Delaware statute providing for the appointment of a receiver of an insolvent debtor for the benefit of any creditor.

Hanks Dental Association v. *Tooth Crown Co.*, 194 U. S. 303. A New York statute providing for the taking of depositions of an opposite party.

Ex Parte Fisk, 113 U. S. 713. To the same effect.

David Upton's Sons v. *Auto Club of America*, 225 U. S. 489. A New York Statute forbidding a foreign corporation doing business in that State without a license from maintaining any action in that State.

Nudd, et al. v. *Burrows*, 91 U. S. 426. An Illinois statute requiring the court to instruct only in writing held not to apply and limit the Federal Court sitting in Illinois from instructing orally.

Vicksburg and Meridian Railroad Co. v. *Putnam*, 118 U. S. 545. To the same effect.

St. Louis, Iron Mountain & Southern Ry. v. *Vickers*, 122

U. S. 360. To the same effect even where the State Constitution provides that juries must be instructed in writing and not orally.

Lincoln v. *Power,* 151 U. S. 436. To the same effect.

Payne v. *Hook,* 74 U. S. 425. A Missouri statute limiting rights of action against executors to the Probate Court.

In the case of *Camden & Suburban R. R. Co.* v. *Stetson,* 177 U. S. 172, this court reviewed extensively the case of *McGovern* v. *Hope,* 63 N. J. Law, 45 Atlantic Reporter, and also reviewed the case of *Lyon* v. *Railway Co.,* 142 N. Y. 298, 37 N. E. 113. In the last mentioned case which involved a statute of New York authorizing an order requiring a physical examination, the Court of Appeals of New York said (p. 113); (Italics ours)

> "*The statute enacts a rule of procedure, the purpose of which is the discovery of the truth* in respect of certain allegations which the plaintiff has presented for judicial investigation in the courts of justice. It prescribes a method of aiding the court and jury in the correct determination of an issue of fact raised by the pleadings, and, as it seems to me, does not violate any of the express or implied restraints upon legislative power to be found in the fundamental law."

This language was quoted with approval and followed in the New Jersey case above referred to.

In the Illinois cases relied upon by counsel for petitioner, the Supreme Court while denying the right of the lower courts to make orders for examination in the absence of a general rule or statute, treats the matter as one of practice.

See *Peoria, D. & E. Ry. Co.* v. *Rice,* 144 Ill. 227, 33 N. E. 951 (1893). Petitioner quotes from page 232 of the Illinois report, Petitioner's Brief, p. 13, as follows:

> "*Rules of practice must be laid down,* not with reference to a single case, but to be applied generally, and we entertain no doubt that our conclusion heretofore announced on this subject is the better and *safer practice.*" (Page 13, Petitioner's Brief.)

The case of *Stack* v. *New York, N. H. & H. Ry. Co.*, 58 N. E. 686 (Mass. 1900) relied on by the plaintiff contains an opinion by Chief Justice Holmes of the Massachusetts Supreme Court. Reference to that opinion shows that he treated the matter as being without doubt a matter of procedure. After speaking of the holding of this court in the case of *Union Pacific* v. *Botsford*, 141 U. S. 250, that the court in and of itself had no power to enter the order, Mr. Justice Holmes said, at page 686:

> "But, if the power should be deemed needful to a more perfect *administration of justice*, the *remedy* should be furnished by the legislature, which as yet has not gone so far." (Italics ours.)

The matter here involved is really a part of the general subject of discovery and the courts from the very first have sustained discovery statutes as a matter of procedure.

Discovery statutes were attacked on the ground that they constituted invasion of the substantive rights of the parties litigant and yet such statutes have been uniformly upheld as not invading the substantive rights of the parties. For example, see Federal Discovery in Operation, by James A. Pike and John W. Willis, University of Chicago Law Review, February 19, 1940, Vol. 7, p. 297, where there is a full discussion on this subject.

In *Sinclair Refining Co.* v. *Jenkins*, 289 U. S. 689, there was a bill for discovery on the equity side of the court for aid in the trial of a law suit pending. It was held to be a valid procedure, the court saying, at page 693:

> "1. The remedy of discovery is as appropriate for proof of a plaintiff's damages as it is for proof of other facts essential to his case.
>
> Help for the solution of problems of this order is not to be looked for in restrictive formulas. Procedure must have the capacity of flexible adjustment to changing groups of facts. The law of discovery has been invested at times with unnecessary mystery. There are few fields where considerations of practical

convenience should play a larger role. The rationale of the remedy, when used as an auxiliary process in aid of trials at law, is simplicity itself. At times, cases will not be proved, or will be proved clumsily or wastefully, if the litigant is not permitted to gather his evidence in advance."

See also for a full discussion of this problem the following:

The Origin of the Conformity Idea, Its Development, the Failure of the Experiment, the Evils Which Resulted Therefrom, and the Cure for Those Evils, by Edgar B. Tolman, American Bar Association Journal, December 1937, Page 971.

To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence? By T. F. Green, American Bar Association Journal, June 1940, Page 482.

On this question whether the matter of a physical examination of a party litigant in a proper case is a matter of substantive law or infringes a substantive right, we submit the following quotation from the dissenting opinion in the case of *Union Pacific* v. *Botsford*, 141 U. S. 250, as an apt expression of the general problem involved where legislation has covered the subject, even though in the *Botsford* case the language was in conflict with the majority opinion in the absence of such legislation (page 258):

"The end of litigation is justice. Knowledge of the truth is essential thereto. It is conceded, and it is a matter of frequent occurrence, that in the trial of suits of this nature the plaintiff may make in the court-room, in the presence of the jury, any not indecent exposure of his person to show the extent of his injuries; and it is conceded, and also a matter of frequent occurrence, that in private he may call his personal friends and his own physicians into a room, and there permit them a full examination of his person, in order that they may testify as to what they see and find. In other words, he may thus disclose the actual facts to the jury if his interest require;

but by this decision, if his interests are against such a disclosure, it cannot be compelled. It seems strange that a plaintiff may, in the presence of a jury, be permitted to roll up his sleeve and disclose on his arm a wound of which he testifies; but when he testifies as to the existence of such a wound, the court, though persuaded that he is perjuring himself, cannot require him to roll up his sleeve, and thus make manifest the truth, nor require him in the like interest of truth, to step into an adjoining room, and lay bare his arm to the inspection of surgeons. It is said that there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration; and if in other cases in the interests of justice, or from consideration of mercy, the courts may, as they often do, require such personal examination, why should they not exercise the same power in cases like this, to prevent wrong and injustice?"

IV.

The Petitioner's Contention Is Not Tenable That the Term "Substantive Rights" Means Rights That Are Important or of Substance and Which Are in Fact Affected by Rules that Are Purely Procedural.

We wish now to turn to that contention of counsel for the petitioner that even conceding that Congress had the right to delegate the power to make such a rule as here involved, it did not do so, but on the contrary by directing the court not to make rules modifying substantive rights, it distinctly limited the delegation of power so as to forbid any rule abridging or modifying any right which is substantive in the sense of being substantial or important. The right asserted is, as expressed by the petitioner, "a right in the Illinois courts not to be compelled to submit to a physical examination" to determine the injuries she claimed were caused by the defendant. (Plaintiff's brief, p. 16.)

But the term "substantive rights" has no such limited meaning. That term has come to have a definite meaning. It is used interchangeably with "substantive law", depending upon the form of the expression; that is to say, whether one is speaking of the rights themselves or the source of those rights. If one is speaking of the source of such rights, the term used is substantive law. If one is speaking of the rights created by that source, the term used is substantive rights. And either term, substantive rights or substantive law, is directly in apposition to that other branch of the law covered by the term "procedural" or "adjective" law.

Moreover it is clear beyond dispute that no party litigant has a substantive right in any kind of procedure. That is too well settled by this court to require any discussion.

Luria v. *United States*, 231 U. S. 9.
Ochoa v. *Hernandez*, 230 U. S. 139.
Bronson v. *Kinzie*, 42 U. S. 311.
McCracken v. *Hayward*, 43 U. S. 608.
Home Bldg. & Loan Assn. v. *Blaisdell*, 290 U. S. 398.

Hence, the first answer to the contention of counsel for the petitioner is that Congress in making use of the term must be held to have used it in its ordinary accepted sense as covering substantive law as contradistinguished to procedure.

Counsel for the petitioner, in support of their petition, argue:

First, (a) that to give the language any other meaning, particularly the meaning that the limitation is directed against the abridging of substantive rights created by substantive law, would be to make the language purely surplusage, as Congress had no authority to change substantive laws.

Second, (b) that the plaintiff has a substantive right

under the law of Illinois not to be compelled to submit to a physical examination and that the Federal Court sitting in Illinois should apply Illinois law.

Third, (c) that the right is declared by this court in the case of *Union Pacific* v. *Botsford*, 141 U. S. 250, to be a substantive right, as that term is above defined by counsel.

We will discuss these propositions in the order named.

(a) *As to the contention that to give any other meaning to the limitation in the Rules Enabling Act than that contended for by the petitioner is to render the limitation surplusage and meaningless.*

This contention overlooks the fact that in the same paragraph there is included a limitation that in promulgating a union of equity and law rules "the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate."

Certainly no one would contend that a rule modifying the right of trial by jury would be any the more effective in the absence of the injunction by Congress in the Enabling Act that this court make no rule violating the constitutional provisions as to jury trials. Congress neither had the power to abridge that right of trial by jury by any legislation nor could it delegate any such power to the court. And yet there is no other meaning to the language than that it is a specific injunction against a rule violating constitutional rights.

This same consideration applies to the language with reference to substantive rights. Moreover, that language did have a particular meaning in view of the fact that the rule of *Swift* v. *Tyson*, 16 Pet. 1, was the law at the time the Enabling Act was passed in 1934, and it might well have been contended under the rule of that case that Congress had the power to enact statutes affecting substantive

law, as declared by State decisions as contradistinguished to State statutes. It was not until 1938 that this court in *Erie* v. *Tompkins*, 304 U. S. 64, overruled the rule announced in *Swift* v. *Tyson*, 16 Pet. 1.

Therefore, Congress would be well justified in specifically providing that the rules authorized by the Enabling Act should be outside of the field of substantive law and be confined to the field of procedural law.

Certainly a forced and distorted construction of the Rules Enabling Act should not be permitted simply because of an expression by Congress of a natural human tendency, almost impossible to resist, to add words of caution when using words of permission or words delegating authority.

(b) *As to the contention that the plaintiff has a substantive right under the law of Illinois not to be compelled to submit to a physical examination and that the Federal Court sitting in Illinois should apply the Illinois law.*

In view of the fact that counsel for the petitioner in the reply brief filed when the petition for writ of certiorari was being considered took issue with us as to our statement of their position with reference to the Illinois law, we feel it necessary to set forth fully their own statement of that position:

They say:

> "* * * an order for a physical examination may not be granted under Rule 35 in a federal court sitting in a state, as Illinois, where there is no state statute providing for the order and where the state courts hold the order to exceed a court's power. * * * Plaintiff contends that Rule 35 abridges her substantive rights because she has a right in the Illinois courts not to be compelled to submit to a physical examination; and that Rule 35 is thus invalid as to her." (Petitioner's Brief, p. 15.)

And after referring to the law of Indiana which requires

the plaintiff in a personal injury suit to submit to a physical examination, petitioner says, at page 17 of the brief:

> "Is it incumbent on a federal court sitting in Illinois to follow this Indiana rule? Plaintiff contends that it is not, that the law of Illinois—the law of the forum—governs."

They argue that it is inconceivable that an Illinois state court would order a physical examination in a case where the tort occurred in another state, and conclude:

> "The law of the forum that a federal court applies is the law of the state where the court sits—in this case, Illinois. There is thus no basis for applying the Indiana law." (Petitioner's Brief, p. 63.)
>
> * * * * *
>
> "Thus, no matter how an order for a compulsory physical examination may be classified in determining whether or not it modifies the substantive rights of a litigant, it is clear that it is classified as a rule of procedure within the rule that the law of the forum governs procedure." (Petitioner's Brief, p. 54.)

When in reply it was pointed out by the respondent that the forum of the Federal District Court is the United States and not Illinois and that Illinois law has no part at all in the solution of the problem, counsel for petitioner said in his reply brief, at page 2:

> "This contention of the petitioner does not in itself involve the law of Illinois. But certain excluding distinctions made in petitioner's brief required a description of the Illinois law. These distinctions were made to define the scope of the question presented and to show that the petitioner was in a position to make the contention outlined above."

Whatever may be the limitation that counsel meant by the quoted language to be put upon the position taken in their original argument, as above set forth, the fact remains they contend that the law of Illinois has *some effect somehow* in this matter. But it is settled beyond dispute that no State law, either decisional or statutory, has any effect whatsoever to govern Federal courts in matters of

procedure; unless, of course, a specific act of Congress adopts State law of procedure. And now that the Conformity Act which accomplished that purpose has become "of no further force or effect" and has been superseded by the Federal Rules of Civil Procedure, there is no Federal statute which makes State laws applicable to procedure in the Federal District Courts (except, of course, a limited number of the rules themselves not now in question in this case, *e. g.*, Evidence Rule 43, Rules 62, 64 and 69).

The cases cited above under Point III conclusively establish that proposition as follows:

McCracken v. *Hayward*, 2 Howard 608.
Bank of the United States v. *Halstead*, 10 Wheat 51.
Wayman v. *Southard*, 10 Wheat 1.
Beers v. *Haughton*, 34 U. S. 329, 359.
Shepard v. *Adams*, 168 U. S. 618.
Southern Pacific Co. v. *Denton*, 146 U. S. 202.
Mexican Central Railway v. *Pinkney*, 149 U. S. 194.
Potter v. *National Bank*, 102 U. S. 163.
King v. *Worthington*, 104 U. S. 44.
Pusey & Jones Co. v. *Hanssen*, 261 U. S. 491.
Hanks Dental Assn. v. *Tooth Crown Co.*, 194 U. S. 303.
Ex Parte Fisk, 113 U. S. 713.
David Upton's Sons v. *Auto Club of America*. 225 U. S. 489.
Nudd et al. v. *Burrows*, 91 U. S. 426.
Vicksburg and Meridian Railroad Co. v. *Putnam*. 118 U. S. 545.
St. Louis, Iron Mountain & Southern Ry. v. *Vickers*, 122 U. S. 360.
Lincoln v. *Power*, 151 U. S. 436.
Payne v. *Hook*, 74 U. S. 425.

The argument of the petitioner seems to be based on the proposition that the Rules of Decision statute is what controls and that where there is in the State where the Federal Court is sitting no statute providing for a physical examination, there can be no Federal rule of court permitting it.

But the Rules of Decision statute can not help the petitioner in any way, as that statute does not apply to matters of procedure, and does apply only to matters of substantive law. That proposition counsel for the petitioner themselves recognize and in fact assert with supporting authorities in another section in their brief. Counsel say, at page 38:

> "Chief Justice Marshall said that it (The Rules of Decision Statute), 'has no application to the practice of the court. * * *' (*Wayman* v. *Southard*, 10 Wheat, 1, 26 (1825.) * * * 'This statute refers only to substantive law and has no application to procedure in federal courts.' (3 Foster, Federal Practice, 6th ed., 1921, p. 2448.) * * * 'Again, the statute refers to state statutes governing substantive rights; it does not apply to state statutes of procedure' (Dobie, Federal Procedure, 1928, p. 560)."

(c) *As to the contention that this court has held that the matter involves a substantive right as counsel define that term.*

The two cases relied upon by counsel for the petitioner in support of this contention are *Union Pacific Railway Co.* v. *Botsford*, 141 U. S. 250, and *Camden and Suburban Railway Company* v. *Stetson*, 177 U. S. 172.

All that the *Botsford* and *Camden* cases hold is that an order of court for an examination to be valid must have behind it an act of the legislature. As said in the *Camden* case, at page 174:

> "It is settled in this court that no power to make such an order *exists at common law;* in other words, the *court* has *no inherent power* to make it." (Italics ours.)

But where there is an act of the legislature behind the order, then the order is valid and that is settled by those very cases. But what legislature?

Obviously the legislation must be by Congress, since it is clear that the matter involved is in fact procedure and, moreover, the basic assumption in counsel's argument is that it is procedure. That argument proceeds on the theory that the dividing line between permissible and prohibited rules does not lie between substantive law and procedural law, but between two classifications of procedural law, one of which, according to counsel's conception, includes ordinary matters that are within the court's rule making power and the other of which includes important matters of substance which are not within that power *in the absence of enabling legislation.*

But assuming for the sake of argument only that counsel's position is correct with reference to this classification, the question is at once reduced to the inquiry whether there is an Act of Congress authorizing an order for a physical examination. Clearly we have such a legislative act in this case.

Congress in the Rules Enabling Act made a broad delegation of power to this court:

(1) To promulgate law rules and by their very promulgation render all acts of Congress in conflict therewith of no further force or effect; and

(2) To unite the equity and law rules, such rules to take effect upon the close of the Congressional session at which they were duly reported.

And in accordance with those very terms of the Rules Enabling Act, the Rules of Civil Procedure for the District Courts of the United States were ordered by this court to be transmitted to the Attorney General on December 20, 1937, so that he might report them to Congress (302 U. S. 783), and they were by him reported to Con-

gress at the beginning of a session on January 3, 1938. Then followed extensive hearings before the Senate and House Committees having the matter in charge and extensive discussions were had in both houses of Congress concerning all the rules, the limiting provision in the Enabling Act, and this particular Rule No. 35. There was also presented a resolution to postpone the approval of the rules. But this resolution was unfavorably acted upon and the session came to a close without Congress making any change in the rules whatever. (See hearings before the House Committee, pages 47, 67, 105, 117, 131, 141 before the Senate Committee, pages 1, 9, 10, 18, 20, 21, 28, 29, 36-44, and also Congressional Record, Volume 83, Part H, pages 8473 to 8474.)

Thereby the rules became effective. And whatever question previously might have been raised as to the validity of some of them on the theory that a legislative act was wanting, that question disappeared by virtue of the action of Congress in accepting the rules without change. Such was the effect, whether the action of Congress (1) be regarded merely as indicating that there was no curtailing by Congress of the broad powers previously delegated; or (2) be regarded as a reaffirmance of that delegation of power; or (3) be regarded as a construction of the rules as not violating the limitation provision in the Enabling Act; or (4) be regarded indeed as a ratification, a confirmation and approval of the action of this court in promulgating the rules. So however the action be looked upon, the result was that the rules came to have the full force and effect of an act of Congress, and the argument is met that an order of court for a physical examination to be valid must have legislative authority.

In the cases of *Isbrandtsen-Moller Co., Inc.* v. *U. S., et al.*, 14 Fed. Supp. 407, 300 U. S. 140, and *Swayne & Hoyt, Ltd.* v. *U. S.*, 300 U. S. 297, this court had occasion to consider an Executive Order of doubtful validity made under the

Executive Department Reorganization Act of 1932, transferring the Shipping Board to the Department of Commerce. The order as entered was, in accordance with the terms of the statute, reported to Congress. Congress made no change, in it and moreover later in appropriation and other statutes recognized that the transfer had in fact been made. And this court held that whatever the doubt with reference to the validity of the initial order, the subsequent acts of Congress had ratified the action of the Executive Department, thereby giving it the full force and effect of an act of Congress.

In the case of *Swayne & Hoyt, Ltd.* v. *U. S.*, 300 U. S. 297, above quoted, this court said, at page 301:

> "It is unnecessary now to pass on the efficacy of the transfer by Executive Order, for we are of opinion that as Congress itself had power to abolish the Shipping Board and to require its functions to be performed by the Secretary, it had power to recognize and validate his performance of those functions even though their attempted transfer by Executive Order was ineffectual.
>
> "It is well settled that Congress may, by enactment not otherwise inappropriate, 'ratify * * * acts which it might have authorized,' see *Mattingly* v. *District of Columbia*, 97 U. S. 687, 690, and give the force of law to official action unauthorized when taken. * * * And we think that Congress, irrespective of any doctrine of ratification, has, by the enactment of the statutes mentioned, in effect confirmed and approved the exercise by the Secretary of powers originally conferred on the Shipping Board."

We are not arguing that, construing the limitation provision in the Enabling Act as *forbidding rules in the field of substantive law as contra-distinguished to procedural law,* a rule abridging substantive rights by invading that field could be made valid by an Act of Congress.

But we do argue that accepting counsel's contention that the limitation provision in the Enabling Act forbids *procedural rules affecting matters of substance or importance,* then a rule violating the limitation provision as thus con-

strued would be made valid by a subsequent Act of Congress; and in this instance Congress by accepting the rules without change confirmed and ratified them and thus gave them the full force and effect of an Act of Congress.

V.

The Contention of the Plaintiff as to the Meaning of Substantive Rights, If Adopted, Would Lead to Great Confusion and Nullify Many of the Rules of Civil Procedure.

The main objective that Congress and this court had in making the Federal Rules of Civil Procedure was to simplify a problem in its essense of great difficulty; that is, the functioning of a Federal Court system alongside of the systems in operation in the forty-eight states.

The adoption of the suggestion made by the petitioner would, we submit, not only defeat this main objective but would render an already complicated subject, far more complicated than it was before the rules were attempted.

This is demonstrated by a moment's looking backward at the history of the propositions that the Federal Courts in matters of substantive law are bound by the laws of the State where the cause of action arose and in matters of procedure are bound by the Federal statutes.

With reference to substantive law, as pointed out by this court in *Erie R. R.* v. *Tompkins,* 304 U. S. 67, the decision in *Swift* v. *Tyson,* 16 Pet. 1, construing the Rules of Decision statute of 1789 to apply only to statutory and not to decisional law, led to a great deal of confusion. Also, as has been pointed out in the many discussions that have taken place both before and after the enactment of the Rules Enabling Act, the many questions and decisions coming up under the Conformity statute led to a great deal of confusion in matters of procedure.

But now at last by virtue of *Erie* v. *Tompkins*, 304 U. S. 64, the Rules Enabling Act, and these rules adopted by this court, the entire problem has been materially simplified. First, the laws as to substantive rights involved in any litigation before the Federal Court are to be governed by the laws, both statutory and decisional, of the State where the cause of action arose. Second, the procedure in that litigation is to be governed by uniform rules applicable to all Federal Courts wherever located.

The quotation by counsel (Suppl. Brief, p. 8) from the article by Judge Charles E. Clark (8 George Washington Law Review 1238, 3 Federal Rules Service, Law Review P. 33-1), entitled "Procedural Aspects of the New State Independence" makes no distinction between different categories of procedural regulations. Reference to the context of the article will demonstrate that the author was discussing the question whether burden of proof was a matter of procedure or substantive law. Hence, counsel's contention that the limitation provision in the Enabling Act makes a distinction between different categories of procedure finds no support in this quotation. On the contrary, Judge Clark in the opening paragraphs of the article repudiates the contention and sums up his objections as follows:

> "If, on the other hand, we try to say that anything possessing an element of substantive law is beyond the federal rules, the result is staggering. The number of the federal rules about which such issue may be raised is indeed large." (P. 1234.)

And even conceding that here as in every field of law there are twilight zones, we submit that the difficulties that may arise in close cases are more fanciful than real and that the line between substantive law and procedural law is, practically speaking, a very clear one. However be that as it may, the fact remains, that the simplest line of demarcation that can be drawn is between substantive law on the one hand and procedural law on the other.

But in the case before this court, the court is asked by counsel for the petitioner to adopt an entirely new theory and place the line dividing with reference to the rule making power, not between substantive law and procedural law but between two classes of procedural law. One of these, according to the conception of counsel for the petitioner, would include ordinary matters and be within the rule making power. The other would include substantial and important matters and not be within the rule making power. Such a theory would, we submit, lead to hopeless conflict and confusion and make the matter of practice and procedure in the Federal Courts far more confusing than it was before the rules were promulgated. The dividing line is far less clearly defined and the practical application of such a standard is too difficult to consider.

Moreover, any such theory would nullify a great many of the 87 Rules of Civil Procedure. A casual review of merely the headings of those rules will show how very many deal with substantial and important matters as those terms are used by counsel for the petitioner. In fact, there is hardly any rule which a litigant could not argue violates some substantial and important right under this theory.

In truth, we respectfully suggest that if the theory of petitioner's counsel be adopted then, to borrow an expression found in one of the opinions of this court,

> "The attempted distinction • • • will plunge this branch of the law into a Serbonian Bog." (*Landress* v. *Phoenix Ins. Co.*, 291 U. S. 491, 499.)

VI.

With Reference to Petitioner's Claim That the Substantive Character of the Right Modified by Rule 35 is Indicated by the Questions of Legislative Policy Involved in the Promulgation of the Rule.

The plaintiff, pursuing her argument that the right of privacy is an important and substantial right, contends that Rule 35 is solely for the benefit of defendants and not plaintiffs, and, in fact, discriminates against plaintiffs (p. 43). We submit that there is not only no discrimination but that the rule is reciprocal. In view of the fact that without an act of the legislature given directly or through authorized rules of a court a plaintiff in a personal injury case can hide behind an assertion of modesty and privacy and refuse to permit an examination which would prove or disprove a claimed injury, an act of the legislature or rule of court requiring such an examination is merely corrective and an equalization of the position of the parties. There is no discrimination.

In fact, such a rule work both ways. For while it is, of course, true that an examining physician appointed by the court by that very fact acquires a standing before a jury, and his testimony against the plaintiff (as counsel for the plaintiff assume it will be), will be most telling, it is also true that his testimony would be against the defendant if the facts were as claimed by the plaintiff, and in that case the plaintiff would be at a decided advantage and the defendant at a decided disadvantage. Conceded that the ultimate objective of a trial, irrespective of the parties' attitude, is the truth, this rule aims to accomplish that purpose, whomever the truth may hurt.

In this connection we refer the court to a most exhaustive and scholarly discussion of the matters involved in this rule by Dean Wigmore in his work on Evidence,

Third Edition, Par. 2220. Mr. Wigmore treats the matter under the heading of "Testimonial Privileges".

> "§ 2216. (8) Witness' Body, Chattels, or Premises; Exhumation of Corpse. The testimonial duty (*ante*, §§ 2192-2194) includes every form of disclosure which may assist in the ascertainment of the truth. It is not confined to utterances of the voice. It extends to documents (*ante*, § 2200). It extends also to the human body and to chattels and premises possessed. Apart from any one of the specific privileges already examined, is there ground for claiming a privilege to decline testimonial disclosure in any form other than that of speaking words or producing documents?
>
> The answer must be in the negative:" (Pages 167-168.)

* * * * * *

> "§ 2200. Same: (c) Corporal Exhibition. (A) Duty to Exhibit and Power to Compel. The duty to bear witness to the truth, by whatever mode of expression may be appropriate, includes necessarily the duty to exhibit the physical body, so far as the ascertainment of the truth requires it (*ante*, §§ 2194, 2216). When a civil party's privilege at common law is abolished, why does he not come within this application also of the general testimonial duty, and become compellable to disclose to the tribunal such facts as are ascertainable by inspection of his body."

We have touched upon this subject in view of counsel's statement as to a legislative policy being involved for the purpose of showing that such policy does not exist. It does not seem to us to be properly an issue in this cause, as the sole question here is whether the rule as promulgated is a valid rule.

Respectfully submitted,

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APPENDIX.

Rules Enabling Act. Act of June 19, 1934. Ch. 651. 28 U. S. C. A. §§ 723(b), 723(c).

"Be it enacted * * * That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

SECTION 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session. (Act of June 19, 1934, c. 651, §§ 1, 2 (48 Stat. 1064), U. S. C., Title 28, §§ 723b, 723c.)

Conformity Act. Revised Statutes, § 914. 28 U. S. C. A. § 724.

"Conformity to practice in State courts. The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding. (R. S. § 914.)"

Rules of Decision Act. Revised Statutes, § 721, 28 U. S. C. A. § 725.

"Laws of States as rules of decision. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply. (R. S. § 721.)"

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